SK B&T Pte Ltd v The owners of the ship or vessel 'Silver Moon' of Port Klang (No 1)

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO WA-27NCC-14–02 OF 2016
AZIZAH NAWAWI J
29 NOVEMBER 2016

Civil Procedure — Setting aside — Ex parte order — Court granted ex parte order in favour of plaintiff to transfer cargo owned by plaintiff from defendant's vessel to another vessel — Defendant applied to set aside ex parte order — Whether application should be made ex parte — Whether O 70 r 11 of the Rules of Court 2012 allowed plaintiff to file application for discharge of cargo — Whether defendant had possessory lien over cargo

Shipping and Navigation — Admiralty — Action in rem — Court granted warrant of arrest against defendant's vessel — Court granted ex parte order in favour of plaintiff to transfer cargo owned by plaintiff from defendant's vessel to another vessel — Defendant applied to set aside ex parte order — Whether application should be made ex parte — Whether O 70 r 11 of the Rules of Court 2012 allowed plaintiff to file application for discharge of cargo — Whether defendant had possessory lien over cargo — Rules of Court 2012 O 70 r 11

The plaintiff and the defendant had on 8 January 2016 entered into a time charter party ('the TCP') in which the defendant agreed to time charter its vessel known as 'SILVER MOON' ('the vessel') to the plaintiff. Nevertheless, due to the vessel being unseaworthy and still being off-hire by the defendant for more than seven days, the plaintiff terminated the TCP. Due to the failure of the defendant to provide security in the sum of USD2m, the plaintiff applied for warrant of arrest against the vessel which was granted by the court. The plaintiff subsequently applied for an ex parte order ('the order') to transfer the cargo owned by the plaintiff in the vessel ('the cargo') to the other vessel known as 'MT WOOSHIN ACE', which was also granted by the court. In the present action ('encl 29'), the defendant made an application under O 32 r 6 and O 92 r 4 of the Rules of Court 2012 ('the ROC') for orders that: (a) the order granted ex parte be set aside; (b) the plaintiff to transfer back the cargo from 'MT WOOSHIN ACE' to 'SILVER MOON'; and (c) the plaintiff pay damages to the defendant for wrongfully induced the court to grant the ex parte order. It was not disputed that the plaintiff had the legal right to ask for the discharge of the cargo which was not under arrest, nonetheless, it was the submission of the defendant that the application should not be made and granted ex parte but should had been served to the defendant based on O 70 r 11 of the ROC.

Further, it was submitted that, there was no provision to allow the plaintiff to file an application for a discharge of the cargo as O 70 r 11 of the ROC only deals with the property under arrest ie the vessel 'SILVER MOON'. The defendant also contended that the plaintiff was liable to pay the remaining two months hire in view of the termination of the TCP, pending which the defendant claimed a possessory lien over the cargo pursuant to cl 26 of the TCP.

Held, dismissing encl 29 with costs:

(1) Order 70 r 11(3) of the ROC allows a person other than the sheriff to make an application by notice of application in the action in which the property is under arrest, in the present case, for release of the cargo, and this provision allowed the court to grant an application made ex parte. As such, it could not be said that the court had no jurisdiction to make an order based on an application made ex parte (see para 27).

(2) Since the cargo was not under arrest, the court had allowed the plaintiff's application because it was not in dispute that the cargo belonged to the plaintiff, that the cargo was in a distress situation with urgent compelling circumstances for the prompt discharge of the cargo, and that the defendant owner was notified of this but they had refused to cooperate. It was under such urgent and special circumstances that the court made the order based on an application made ex parte (see para 28).

(3) The defendant's notice of lien was issued on 7 March 2016, whereas the cargo was transshipped onto the vessel, 'MT WOSHIN ACE' on 27 February 2016, about eight days earlier. Therefore, when the defendant's notice of lien was issued, the defendant was no longer in possession of the cargo. As such, there was no longer any issue of possessory lien (see paras 31 & 35).

[Bahasa Malaysia summary

Pihak plaintif dan defendan telah pada 8 Januari 2016 membuat perjanjian carter masa ('PJM') bahawa defendan bersetuju untuk carter masa kapalnya yang dikenali sebagai 'SILVER MOON' ('kapal') kepada plaintif. Walau bagaimanapun, oleh sebab kapal itu tidak layak untuk belayar dan masih dibaiki (*off-hire*) oleh defendan untuk lebih daripada tujuh hari, pihak plaintif telah menamatkan PJM itu. Oleh sebab defendan gagal untuk menyediakan cagaran berjumlah USD2 juta, pihak plaintif telah memohon suatu waran menahan ke atas kapal itu yang telah dibenarkan oleh mahkamah. Pihak plaintif selanjutnya telah memohon suatu perintah ex parte ('perintah') untuk memindahkan kargo yang dimiliki plaintif dalam kapal itu ('kargo') ke sebuah kapal lain dikenali sebagai 'MT WOOSHIN ACE', yang turut dibenarkan oleh mahkamah. Dalam tindakan ini ('lampiran 29'), pihak defendan membuat suatu permohonan di bawah A 32 k 6 dan A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk perintah bahawa: (a) perintah ex parte itu

diketepikan; (b) pihak plaintif memindahkan kembali kargo dari 'MT WOOSHIN ACE' ke 'SILVER MOON'; dan (c) pihak plaintif membayar ganti rugi kepada defendan kerana mendorong mahkamah dengan salah untuk memberikan perintah ex parte itu. Tidak dinafikan bahawa pihak plaintif mempunyai hak perundangan untuk meminta kargo yang tidak berada di bawah tahanan dilepaskan, namun begitu, menjadi hujahan defendan bahawa permohonan itu tidak sepatutnya dibuat dan diberikan secara ex parte tetapi sepatutnya diserahkan kepada defendan berdasarkan kepada A 70 k 11 KKM. Selanjutnya dihujahkan bahawa tidak terdapat peruntukan untuk membenarkan palintif memfailkan suatu permohonan untuk melepaskan kargo oleh sebab A 70 k 11 KKM hanyalah berkenaan dengan harta di bawah tahanan iaitu kapal 'VESSEL MOON'. Pihak defendan juga menghujahkan bahawa pihak plaintif bertanggungan untuk membayar baki dua bulan sewa disebabkan oleh penamatan PJM itu, yang sementara itu pihak defendan menuntut lien pemilikan ke atas kargo itu menurut klausa 26 PJM.

Diputuskan, menolak lampiran 29 dengan kos:

(1) Aturan 70 k 11(3) KKM membenarkan seseorang selain daripada sherif untuk membuat suatu permohonan melalui notis permohonan dalam tindakan harta di bawah tahanan, dalam kes ini, pelepasan kargo itu, dan peruntukan ini membenarkan mahkamah membenarkan suatu permohonan yang dibuat secara ex parte. Oleh itu, tidak boleh dikatakan bahawa mahkamah tidak mempunyai bidang kuasa untuk membuat suatu perintah berdasarkan kepada suatu permohonan yang dibuat secara ex parte (lihat perenggan 27).

(2) Oleh sebab kargo itu bukanlah di bawah tahanan, mahkamah telah membenarkan permohonan plaintif kerana ia tidak dinafikan bahawa kargo itu adalah milik plaintif, bahawa kargo itu berada dalam keadaan genting dengan keadaan mendesak yang memaksa supaya pelepasan segera kargo dibuat, dan bahawa pihak defendan telah dimaklumkan tentang perkara ini tetapi mereka enggan untuk bekerjasama. Disebabkan keadaan yang mustahak dan tertentu itulah maka mahkamah membuat perintah berdasarkan suatu permohonan yang dibuat secara ex parte (lihat perenggan 28).

(3) Notis lien oleh defendan telah dikeluarkan pada 7 Mac 2016, manakala kargo itu telah dipindahkan ke kapal 'MT WOSHIN ACE' pada 27 Februari 2016, lebih kurang lapan hari sebelum itu. Oleh yang demikian, semasa notis lien oleh defendan dikeluarkan, pihak defendan tidak lagi memiliki kargo itu. Oleh itu, tiada lagi isu berkenaan dengan lien milikan (lihat perenggan 31 & 35).]

Notes

For a case on action in rem, see 11(1) *Mallal's Digest* (5th Ed, 2015) para 1231.
For a case on ex parte order, see 2(4) *Mallal's Digest* (5th Ed, 2015) para 8311.

Cases referred to

Caldwell v Sumpters and another [1972] Ch 478, CA (refd)
TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd [1985] 2 MLJ 45, FC (refd)

Legislation referred to

Arbitration Act 2005 s 11
Courts of Judicature Act 1964 s 24(b)
Rules of Court 2012 O 32 r 6, O 70 r 11, 11(1), (3), O 92 r 4
Senior Courts Act 1981 [UK] ss 20(2)(h), 21(4)

J Joseph (Joseph & Partners) for the plaintiff.
S Ramesh (Rastam Singh & Co) for the defendant.

Azizah Nawawi J:

APPLICATION

[1] Enclosure (29) is an application filed by the defendant under O 32 r 6 and O 92 r 4 of the Rules of Court 2012 ('the ROC 2012') for the following orders:

(a) that the order granted ex parte by this court dated 23 February 2016 be set aside;

(b) that the plaintiff be ordered to transfer back the cargo of 3,942,069 KL Marine Gas Oil ('the cargo') from the vessel 'MT WOSHIN ACE' to the vessel 'SILVER MOON'; and

(c) that the plaintiff pay damages to the defendant for wrongfully induced this court to grant the ex parte order.

[2] The grounds of the application are as follows:

(a) that the plaintiff's application under O 70 r 11 of the ROC 2012 and under s 11 of the Arbitration Act 2005 does not allow the plaintiff to apply for an ex parte order as the property referred to the writ of summons, the warrant of arrest and the supporting affidavits of the plaintiff referred to the vessel 'SILVER MOON' and not to the cargo;

(b) that based on cl 26 of the time charter party dated 8 January 2016 ('TCP dated 8 January 2016'), the defendant has a possessory lien claim over the cargo; and

(c) that the plaintiff knew that the defendant has refused to the transshipment of the cargo, hence the plaintiff have secured an ex parte order over the cargo.

[3] Having considered the application and the submissions of the parties, this court had dismissed the defendant's application in encl (29) with costs.

THE SALIENT FACTS

[4] The plaintiff is a company incorporated in Singapore with its registered address at Raffles Place, Republic Plaza, Singapore.

[5] The defendant, Silverline Maritime Sdn Bhd, is the registered owner of the vessel, 'SILVER MOON'.

[6] The plaintiff and the defendant has entered into a time charter party on 8 January 2016 (the TCP dated 8 January 2016), whereby the defendant agreed to time charter the vessel to the plaintiff for a period of three months, with a further six months in charters option.

[7] The TCP dated 8 January 2016 included an arbitration clause which states as follows:

> Clause 67. Any and all differences and disputes whatsoever nature arising out of this charter *shall be put to arbitration in the city of London* pursuant to laws relating to arbitration there in force ...

[8] The plaintiff had purchased 4000 KL of Marine Gas Oil (the cargo) from a company called Chemoil International Pte Ltd ('Chemoil International') on 12 January 2016 with the intended purpose of shipment on board the vessel, the 'SILVER MOON'.

[9] Upon loading a quantity of 3,942.069 KL Cargo of MGO represented by bill of lading No BL-507710-019458 on board the vessel in the Port of Banyan, Singapore, the terminal issued an electronic bill of lading to the order of Chemoil International. The plaintiff paid for the cargo in full and the bill of lading was endorsed to the order of the plaintiff. Hence, the plaintiff is the owner of the cargo on board the vessel.

[10] The plaintiff then gave instructions to the defendant to head to the South Indian Ocean for cargo operations near Male, Maldives.

[11] Despite having received the said instructions from the plaintiff to sail directly to Male, Maldives, the vessel on 8 February 2016 deviated towards a

port of refuge, Tanjung Pinang Indonesia and eventually berthed at Johor Port to deal with multiple repair works including but not limited to, oil leakage from the cargo tanks specifically tanks 4S and 5S, seawater ingress to the cargo tank 6P (and other tanks yet to be identified), failure of the vessel's generator, flooded cabin rooms (including the cooks cabin, oiler cabin and AB room) and damage to the vessel's hull owing to the port side lifeboat being in contact with the boat davit ('the defects').

[12] In view of the vessel being unseaworthy and as a result of being off-hire for more than seven days, the plaintiff contends that the defendant were in repudiatory breach of the TCP dated 8 January 2016. As such, the plaintiff issued a letter to the defendant, accepting the repudiatory breach and terminated the TCP with immediate effect on 15 February 2016.

[13] Vide an email dated 16 February 2016, the plaintiff, through their solicitors Hill Dickinson LLP, reiterating, among others, the termination of the TCP dated 8 January 2016 and demanding security in the sum of USD2m in the form of a bank guarantee.

[14] When the defendant did not provide the security, the plaintiff invoked the admiralty jurisdiction of this court pursuant to s 24(b) of the Courts of Judicature Act 1964 and ss 20(2)(h) and 21(4) of the Senior Courts Act 1981 and by the warrant of arrest, had the vessel arrested.

[15] The writ of summons was filed on 17 February 2016. On an application by the plaintiff, the warrant of arrest was issued against the vessel, 'Silvermoon' on 17 February 2016.

[16] In a supplementary affidavit affirmed by Jeremy Joseph affirmed on 18 February 2016 for and on behalf of the plaintiff, the deponent states as follows in paras (3), (4), (5) and (6):

> 3. I make this affidavit in support of the Plaintiff's Writ in Rem dated 17.2.2016 and Affidavit to Lead to Warrant of Arrest affirmed by me on 17.2.2016.
>
> 4. The Plaintiff's action falls within the provisions of section 20(2)(h) and 21(4) of the Senior Court Act 1981 which enables SK B&T to enforce their claim in rem against the Vessel.
>
> 5. As the Charterparty (cl. 67) dated 8.1.2016 (CP) also provides for an arbitration dispute resolution clause, in which any disputes are to be settled in London, an arrest as security for any claim in a foreign arbitration is permissible under the relevant provisions of the Arbitration Act 2005 and the Arbitration Amendment Act 2011.
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> 6. Notwithstanding the arbitration clause incorporated in the CP and the commencement of London arbitration, I verily believe that this Honourable Court

A has the power to issue a Warrant of arrest by way of interim remedy to secure the Plaintiff's claim by arrest of the Vessel, pursuant to section 11(1)(e) of the Arbitration Act 2005 [as amended by section 5 Arbitration (Amendment) Act 2011]. So far as the relevant arbitral powers are concerned, these are set out in Section 11 f the Arbitration Act 2005.

B

[17] On 19 February 2016, the plaintiff issued a demand for security to be furnished for the release of the vessel but the defendant/owners failed to provide the security and the vessel continues to be under arrest by this court.

C

[18] As the defendant failed to agree or cooperate with the ship-to-ship transfer, the plaintiff applied for an ex parte order to transfer the cargo to the other vessel, MT 'WOOSHIN ACE'. The application (encl 14) is premised on O 70 r 11 of the ROC 2012 and s 11 of the Arbitration Act 2005 and is based on; inter alia, the following grounds:

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(a) if the cargo continues to remain n board the vessel, Silvermoon, in her present unsafe and unseaworthy conditions as evidenced by the survey report, the cargo is highly likely to be damaged and further deteriorate in quality which will materially reduce its value and incur further losses to the plaintiff;

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(b) there is potential risk of oil pollution arising out of the cargo on board the vessel which makes it necessary and urgent to transship the cargo; and

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(c) the plaintiff has incurred and continue to incur substantial losses caused by the delay and non-delivery of the cargo. It would be just and expedient to allow the application for transshipment to resolve the distress situation.

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[19] The order was granted on 23 February 2016, and pursuant to the said order, the discharge and transshipment operations were carried out and concluded on 27 February 2016. The cargo is now on the 'WOOSHIN ACE' and she sailed on 29 February 2016.

H

THE FINDINGS OF THE COURT

[20] The defendant did not challenge the legal rights of the plaintiff over the cargo, and it is not in dispute that the plaintiff is the legal owner of the cargo shipped for delivery on the defendant's vessel, 'SILVER MOON'.

I

[21] As the owner of the cargo, it is not in dispute that the plaintiff has the legal right to ask for the discharge of the cargo, which was not under arrest. This can be seen from the Admiralty Practice Direction 1/2012 which provides that:

Admiralty Maritime Claims Practice Direction 1/2012

F. Discharge of Cargo

23. Upon arrest of a ship, the ship shall not be allowed to work without the Sheriff's express permission. If the ship has commenced loading before arrest takes place, then immediately after execution of the arrest warrant, the Sheriff or Assistant Sheriff shall direct the master to cease all cargo loading operations.

However, *if at the time of the arrest, the cargo which is not under arrest* is being unloaded by the cargo owners and the Sheriff or Assistant Sheriff allows the unloading to continue, he shall require the cargo owners or demise charterers of the ship or their agents to furnish a letter of indemnity with regard to the Sheriff's liability if there is an accident whilst unloading cargo. However, if unloading is not permitted or ceased at the Sheriff's direction, *a person who is entitled to immediate possession of the cargo may have the cargo discharged from the ship without intervening in the action by requesting the Sheriff or Assistant Sheriff or the arresting party to take appropriate steps to enable the cargo to be discharged. If the Sheriff or Assistant Sheriff or the arresting party considers the request to be reasonable and the cargo owners give an undertaking to pay the Sheriff's costs and expenses, the Sheriff or Assistant Sheriff or the arresting party shall apply to Court for appropriate orders*. Alternatively, the cargo owners can intervene in the action and apply to the Court to discharge the cargo from the ship. The costs of discharging the cargo shall be the responsibility of the cargo owners. (Emphasis added.)

[22] In the present case, as the arresting party (the plaintiff) is the owner of the cargo, then the arresting party can apply to the court for a discharge of the cargo from the ship.

[23] However, it is the contention of the defendant that the plaintiff's application should not have been made and granted ex parte but the application should have been served on the defendant. This is based on O 70 r 11 of the ROC 2012, which provides that:

(O 70, r 11) Applications with respect to property under arrest

11(1) *The Sheriff may at any time apply to the Court for directions with respect to property under arrest in an action and may, or, if the Court so directs, shall give notice of the application to all of the parties to every action against the property* and all persons who have entered a caveat which is still in force.

(2) The Sheriff shall send a copy of any order made under paragraph (1) to all the parties to every action against the property to which the order relates and to all persons who have entered a caveat, which is still in force.

(3) A person other than the Sheriff may make an application under this rule by notice of application in the action in which the property is under arrest and the notice of application together with copies of any affidavits in support shall be served upon the Sheriff and all parties to every action against the property and all persons who have entered a caveat which is still in force unless the Court otherwise orders on an application made ex parte.

[24] It is also the submission of the defendant that under O 70 r 11(1) of the ROC 2012, it refers to directions in respect to 'property under arrest', which is the vessel 'SILVER MOON'. Therefore, there is no provision to allow the plaintiff to file this application for a discharge of the cargo, as O 70 r 11 only deals with the property under arrest, the vessel 'SILVER MOON'.

[25] I am of the considered opinion that from reading O 70 r 11 of the ROC 2012 and para 23 of the Admiralty and Maritime Claims Practice Direction 1/2012, the owners of the cargo, which is not under arrest, may apply to the court for a discharge of the cargo and the application can be made by a notice of application under O 70 r 11(3).

[26] Reference to this provision in the *Malaysian Civil Procedure 2015* Vol 1, para 70/11/3 states this:

> ... When the property is arrested, it comes within the custody of the sheriff and any unauthorized interference with the property amounts to contempt of court ... *The Sheriff may apply to the court for directions (it is generally known as an omnibus order) with respect to the arrested property* (*Bank Pembangunan Malaysia Bhd v Sasacom Sdn Bhd* [2010] MLJU 1402; [2011] 1 AMCR 489). *A common order sought for under this provision is one in which the sheriff is authorized to take appropriate measures to preserve the ship, the machinery and equipments, to discharge the cargo, repatriation of the crew, to move the ship within the limits of the port in which she is lying and to supply or engage his agents to supply victuals, fuel and water to the vessel ... Owners of cargo on board, without intervening in the action, may also ask the sheriff to apply for leave to discharge the cargo or they may apply for leave directly to the court ...* (Emphasis added.)

[27] Therefore, O 70 r 11(3) allows a person other than the sheriff to make an application by notice of application in the action in which the property is under arrest, in this case, for release of the cargo, and this provision allows the court to grant an application made ex parte. As such, it cannot be said that this court has no jurisdiction to make an order based on an application made ex parte.

[28] In the present case, since the cargo was not under arrest, this court has allowed the plaintiff's application because it is not in dispute that the cargo belonged to the plaintiff, that the cargo was in a distress situation with urgent compelling circumstances for the prompt discharge of the cargo, and that the defendant owners were notified of this but the defendant had refused to cooperate. It was under such urgent and special circumstances that this court made the order based on an application made ex parte.

[29] The next issue raised by the defendant is that they have a possessory lien over the cargo pursuant to cl 26 of the TCP dated 8 January 2016, which reads:

> Owners shall have a lien upon all cargoes and all freights, sub-freights and

demurrage for any amounts due under this charter; ... A

[30] It is the submission of the defendant that the plaintiff is liable to pay the remaining two months hire in view of the termination of the TCP dated 8 January 2016. Pending the settlement of the remaining two months of the hire, then under cl 26, the defendant claims a possessory lien over the cargo. B

[31] In the present case, the defendant's notice of lien was issued 7 March 2016, whereas the cargo was transshipped onto the vessel, MT 'WOSHIN ACE' on 27 February 2016, about eight days earlier. Therefore, when the defendant's notice of lien was issued, the defendant was no longer in possession of the cargo. C

[32] In *Admiralty Law and Practice* (2nd Ed) by Toh Kian Sing SC, the author opined at pp 281–282: D

B. General Principles Applicable to Possessory Liens

The lien only operates if the person seeking to enforce it against a chattel comes into possession of the chattel lawfully and for so long as he lawfully retains uninterrupted possession of the chattel. E

...

The possessory lien is self-help remedy in the form of a passive right of detention which is exercisable until the debt is discharged. While it confers no right of action, it affords a defence to an action for the recovery of the chattel by its owner or anyone otherwise entitled to its possession ... F

[33] The same position was taken by Chan J in *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45, where His Lordship quoted the case of *Caldwell v Sumpters and another* [1972] Ch 478 where it was held that possessory liens depends upon the claimant retaining possession of the property in question. The possessory lien is lost if the claimant parts with possession of the property without making any reservation as to his entitlement of a lien over the property. At p 47, the court said this: G

... The law is lucidly illustrated in *Caldwell v Sumpters*. H

It seems plain' said Megarry J in that case, at p 482, 'that a solicitor's possessory lien is lost if the solicitor part with the possession of the deeds without making any reservation ...'.

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[34] On the facts of the case before him, Chan J made the following finding at p 48:

Applying the law to the present case, the architect's possessory lien depends on the plans and drawings in his possession. It is plain that they have a lien on the plans that are

with them but not on those which they have voluntarily parted with possession to Lazar. *Their possessory lien is lost when they parted with the plans without making any reservation*. (Emphasis added.)

[35] Therefore, when the defendant issued the notice of lien on 7 March 2016, the defendant was no longer in possession of the cargo as the cargo had been transshipped on 27 February 2016. As such, there is no longer any issue on the possessory lien.

[36] The defendant however contends that the notice issued by their former solicitors, Messrs Sativale Mathew Arun demanding counter security after arrest can be considered as a notice of lien. The said notice reads:

> It is noted that your clients are the bona fide purchasers and owners of the cargo on board and as the cargo and its carriage constitute the subject matter in our client's counterclaim, we are instructed in exchange for release of the cargo to demand security on the estimated losses as follows and in addition interest and costs on the same scale.

[37] On this, I agree with the plaintiff that the said notice makes no reference to cl 26 of the TCP dated 8 January 2016, nor reserves its rights to exercise a lien over the cargo. It merely purports to seek counter-security for discharge of the cargo.

[38] As such, I am of the considered opinion that the defendant no longer have any possessory lien over the cargo under the TCP dated 8 January 2016.

CONCLUSION

[39] Premised on the reasons enumerated above, I am of the considered opinion that there is no merit in this application and the same is dismissed with costs.

Enclosure 29 dismissed with costs.

Reported by Dzulqarnain Ab Fatar